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THE OLD ORDER CHANGETH—WHAT SHALL THE NEW ORDER BE?

The intense nervous strain produced by the war has released the minds of men everywhere from every conventional restraint and has struck off the shackles of old customs and ancient beliefs once thought to be unalterable. Criticism of all things high and low, sacred and secular, ancient and modern, is the order of the day. In the white heat of this keen mental activity, aroused by the war, many outworn relics of the past will be consumed; it is for us as lawyers to see to it that that which is forever true and good, shall not be mistaken for that which is no longer suitable to the present age. It will at times take an expert's eye carefully to skim the dross from this flux of public controversy into which many of our most cherished institutions and fundamental principles have been thrown.

The law and the courts have not escaped the general spirit of criticism. The people are demanding that the courts shall give an account of their stewardship and a reason for the methods they employ of arriving at justice. It is no longer sufficient to say that a certain rule has been in existence for hundreds of years. Length of years no longer justifies a practice; on the contrary, in this iconoclastic age, it is sometimes the very reason given why it should be discarded.

Lawyers are to some extent to blame for the present defensive position of the courts. They have discouraged honest criticism of the courts by their blind devotion and their strict adherence to the old because it was old without being able, at all times, when pressed into a corner, to give a good reason for many practices which had their beginning in conditions which have long since passed out of existence. On the other hand, no one knows better than a lawyer does, the value of precedent and the danger of innovation in the law. It is therefore incumbent on him to meet the present day spirit of reform in a liberal attitude of mind, being willing to give up all that is obsolete in the law while urging the necessity of holding fast to those principles of primary rights which are the heritage of a thousand years of struggle against intrenched privilege and power.

There can be no doubt, however, that the present is a dangerous as well as a fruitful period of transition which will be marked, as all such periods are marked, by many constitutional, institutional, and legislative changes. Already there is an insistent demand for constitutional conventions in all the states and constitutional conventions have either been voted by the people or provided for by necessary legislation in at least seven states. In Indiana a statute providing for the holding of a convention was declared unconstitutional, on the ground that such a proceeding must be authorized by a vote of the people. The radical changes to the North Dakota constitution recently adopted by a large popular vote have been much discussed in current periodicals and in the daily press.

Since it will be absolutely impossible to resist this ever increasing demand for changes in the organic law of many of the states, even if it were desirable to do so, it would seem to be the part of wisdom for lawyers to join in the public demand for a re-statement of constitutional limitations, but at the same time to urge the postponement of constitutional conventions for a few years, until the intense passions created by the war have subsided and time has allowed opportunity to thrash out the wheat from the chaff of the great stack of radical changes proposed by those who are carried away too often, by enthusiastic devotion to some pet theory. As was well said by Mr. Herbert Harley in the Journal of the American Judicature Society; "The fact is that we are in the midst of developing thought concerning the structure of state government

and a great present danger is that views may be permitted to crystallize before they have been long enough over the fire."

The most encouraging element in the present situation, as we see it, is the strong public reaction against Bolshevism, a convenient, if not exactly accurate term, to express those theories which seek to deprive minorities of their rights and set up a tyranny of temporary majorities more intolerable than the rule of an autocrat. The good common sense of the American people will not stand for any change in the representative character of our democracy.

Another encouraging sign is the disposition of the people to refer all proposed changes to commissions of experts to investigate and report to the legislature or to a constitutional convention upon the advisability of suggested amendments. As an instance of this tendency is the recent action of the Massachusetts legislature, now in session, approving an act providing for a special commission "to investigate the judicature of the commonwealth," directing the commission to ascertain whether any and what changes in the organization of the courts or the methods of procedure may be desirable. The commission is requested to suggest a plan for the reorganization of the judiciary, "the number, character and jurisdiction of the courts, the number and powers of the judges thereof and of the officers thereof," with the idea of securing "a more prompt, economical and just dispatch of judicial business." The personnel of this commission affords assurance that their work will be well done and that their report will exert a strong influence in determining the nature of the changes necessary to meet the new demands of the present age. Hon. Henry N. Sheldon, Justice of the Supreme Court of Massachusetts, is chairman and Mr. John W. Cummings and Dean Roscoe Pound of Harvard University Law School are the other members of this commission. The Boston Transcript in a recent editorial expresses the hope that the commission "will dive at once into the uttermost depths of this formidable subject and bring up some priceless recommendations." This striking though somewhat inapt metaphor expresses the earnest expectations, we are sure, of the great majority of lawyers who are looking for someone to take the lead in the performance of a task which cannot be put off much longer.

Lawyers of the present generation are no more released from the duty to competently meet the present emergency than were Jefferson, Madison, Hamilton, Marshall, Websted and Calhoun from putting forth their best efforts to solve the momentous issues that arose in their lifetime. May there be found men of equal ability, courage, patriotism and scholarship to guide the beloved Republic in this time of stress and trial.

NOTES OF IMPORTANT DECISIONS.

THE LEGAL MEANING OF "ET CETERA."—The habit of using generalizations which have no very distinct or definite meaning is not a good one for a legal draftsman to fall into. A recent decision of an English court holds that it is improper to force upon the court the burden of translating such indefinite expressions. Herman v. Morris (May, 1919, not yet reported). In this case the English Court of Appeals was asked to construe an agreement for the repair of a vessel which provided for demurrage in the event of non-delivery at a certain time, but which excepted delay "due to strikes of workmen, lockouts, etc." Delivery of the vessel was not given at the time agreed upon, because of difficulty in securing motor engines necessary to complete the repair of the vessel due to the government's demand for such engines. In a suit for the amount of the demurrage by the owners of the vessel, the defendant pleaded the exception clause and argued that the term, et cetera, included interference by the government. This argument rested on the contention that by this phrase the parties intended to include in the purview of the exception any other cause ejusdem generis with strikes and lockouts.

The Court of Appeals refused to accept defendant's contention and declared that where

parties wish to put exceptions in their contracts they must sufficiently define those exceptions by setting them out in detail or by use of such general terms as have a clear meaning. The court refused to accept the burden of making definite that which was obviously indefinite in the minds of the parties at the time they executed their contract.

The same attitude toward this phrase is taken by the American courts. In most cases the abbreviation, etc., when used in contracts is regarded as adding nothing to what precedes it, being void for vagueness and uncertainty. Myers v. Dunn, 49 Conn. 71, 76; Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. It is also meaningless when used in a pleading (Whitmore v. Bowman, 4 G. Greene [Iowa] 148); or in a bond to add other parties than those named, Ham's Admr. v. Tichenor, 19 Ky. [3 T. B. Mon.] 196); or when added to the title of a statute, (State v Arnold, 140 Ind. 628, 38 N. E. 820). A few cases have insisted that the term has a definite meaning and includes or imports other things or purposes of a like character. Hayes v. Wilson, 105 Mass. 22; Shuler v. Dutton, 75 Iowa 155. In High Court v. Schweitzer, 70 Ill. App. 139, it was held that an application for insurance which stated the business of the applicant to be "managing a restaurant, etc.," was not untruthful although he also tended bar run in connection with the restaurant, as the term, "etc." included this business of a like character. So also "etc." in a statute was held to enlarge the description, after which it was put so as to include other things of a like character. Garvin v. State, 81 Tenn, 162.

IS 2.75 PER CENT BEER INTOXICATING?—In last week's issue (88 Cent. L. J. 21) we referred editorially to the case of Jacob Hoffman Brewing Co. v. McElligott (U. S. Civ. Ct. of Appeals, 2nd Cir.), on which much reliance has been placed by dramshop keepers to support their contention that 2.75 per cent beer is as a matter of law not intoxicating.

This point was indeed raised in this case, but not decided. The court held that the Wartime Prohibition Act was constitutional, that it appied only to intoxicating liquors; and that the district attorney could not be enjoined from enforcing the law. We have at hand today the interesting dissenting opinion of Justice Rogers, who dissents only as to the modification of the ruling in affirming an order restraining the Collector of Internal Revenue from refusing to issue beer stamps to plaintiff when proper amounts have been tendered for the purchase of such stamps. In all other respects Judge Rogers concurs in the majority opinion. On the question of whether 2.75 per cent beer is intoxicating, a point very earnestly pressed by Mr. Root, Justice Rogers' opinion is interesting. The learned judge said:

In view of the conclusion I have reached that the bill should be dismissed, it is not necessary to pass upon the question as to the construction to be given to the Act of Congress approved November 21, 1918. The statute provides: "After May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruits, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June 30, 1919, until the conclusion of the present war, and thereafter until termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

As it is desired that the judges express their opinion as to the meaning of the words "no beer, wine or other intoxicating malt or vinous liquor," I state my opinion. It is that the rule of construction known as *ejusdem generis* applies. Where general words follow the enumeration of a particular class of things the general words will be construed as applicable to things of the same class as that enumerated. The paramount duty of a court is to see that no effect shall be given to any law which violates the constitution. After that the next duty is to see that effect is given to the legislative intent. I am unable to see any escape from the conclusion that congress in enacting the law had in mind *intoxicating* liquors. In that conclusion I agree with my associates.

Whether beer containing not more than 2.75 per cent of alcohol is intoxicating is not a question of law, but one of fact, and will be determined at the final hearing upon the merits.

The acts of congress now under consideration contain no definition of what per cent of alcohol makes liquor intoxicating. In a number of the states the statutes prohibit the use of all "alcoholic" liquors for beverage purposes. In a large number the standard of an intoxicating beverage is fixed at one-half of one per cent. And for nearly twenty years the Bureau of Internal Revenue has treated beer containing one-half of one per cent or more of alcohol as a malt liquor, and the brewers of the country have acquiesced in this definition of beer. And it is reasonable to expect that the present congress, in enacting a Prohibition Enforcement Bill under the Eighteenth Amendment, will define what is intoxicating liquor, and if it does it may fix the standard at one-half of one per cent in accordance with the rule established for so many years in the Bureau of Internal

Revenue. But in the absence of some definitive legislation the meaning of the term "intoxicating liquors" must be a question of fact and not of law, and the courts cannot undertake to say, as matter of law, that liquor which contains 2.75 per cent of alcohol by weight is not intoxicating. And neither the opinion of my associates, nor the opinion of the district judge, contains anything to the contrary. In the opinion of the district judge he expressly declared "that the question whether beer having 2.75 per cent of alcohol is intoxicating" was not before him for decision.

A CRITIQUE OF THE TECHNICALITY.

There are few persons today, of a critical turn of mind, who have not at some time directed their attention to the Law. It appears that the Law, of all the sciences, has received the most constant and general criticism. Philosophers, statesmen, theologians, business men, and even fiction writers have delivered themselves of some burden of thought regarding the so-called most unprogressive and derelict of all the sciences.

Men, in attempting to apologize for the obvious shortcomings of the Law, have said that, unfortunately, it is not an *exact* science. To demonstrate that the Law is not an exact science, the critics have compared it to the various other sciences, believing, even, that the mere comparison will reveal the defects contended. It may be said, however, that, inasmuch as the Law is interwoven so closely with government and general public affairs, widespread criticism is inevitable, because of the fact that government and general public affairs are considered everybody's business. The courts of the United States, admired by the foreign world (and rightly so, for they represent the acme of present civilization in America), are closely observed and frequently criticised by the American people. Which condition, be it said, is not altogether undesirable. Legislation and adjudication, the system of creating and applying laws, is so fundamentally a part of social order that proper and sincere investigation, and criticism, can result in naught but good.

Nevertheless, it must be said that much of modern criticism of the Law is erroneously founded. Men, in saying that the Law is not up-to-date, compared to other sciences, have gone further and expected that the Law shall be perfect. It is contended that, because laws are supposed to be based upon rules of conscience and right, they should be capable of perfect application, capable of rendering even and unmistakable justice in all cases arising under them. Whenever a case arises, the result of the trial of which is not satisfactory to the critic, he attributes the presumed defect to what is generally known as Technicality.

Throughout the world of science, there has never arisen a subject-matter for more constant criticism than legal technicality. It has been regarded by many critics as inevitably and unconditionally the weak spot in the Law as a science. The critics have pointed out that the Law and the courts deserve little more than contempt for adhering to technical rules. Whether or not other sciences adhere to them seems to have been disregarded.

Now, science, which can never be anything more than accumulated knowledge systematized, is necessarily composed of rules. All the information man has gathered on any subject, with some of his ideas concerning the same, he formulates into the science of that particular subject. He then hands down his work as a guide in its field, recognizing, however, that he cannot claim that it will be universally valid, but that it will be valid in a maximum sense. Men take this prepared science, on whatever subject it may be, amend and add to it by way of improvement as the years go by. But in attempting to apply this scheme of learning, and these arranged rules, to the practical problems for which the science was created, it becomes at once manifest that the science is not in the least perfect; that is to say, that the problems, inasmuch as they have been constantly increasing and

becoming more and more complex as the science was being developed, have grown too great for the science to completely cover or provide for. Man, in preparing his science, has used the knowledge and material in his possession at the time, and of course it has been impossible for him to anticipate the future demands to be made upon it. When these demands are made, the science falls short of answering them, necessarily, inasmuch as it contains nothing suitable to the demands.

Yet this formulated knowledge on a particular subject is all that man possesses on that subject, and he therefore uses it for the best results he can obtain. In attemptin, however, to apply this science to all the demands arising under it, failure to satisfy, error, is observed in many instances; and technicality of operation is thus the inevitable result—the technicality existing because of the fact that rules more or less valid for the most cases must be used in all cases. And here we are even allowing that the science would be perfectly applicable, would perfectly suit every demand upon it, if new problems and demands upon it did not arise after its creation, which, of course, would not be at all reasonable to infer, unless we attribute to man the power to know all things perfectly when immediately before his attention.

So, then, Technicality, which arises because of the necessity of applying to every case the rules made for the greatest number of cases, is inevitable in any science; and, consequently, is by no means peculiar to the Law. And we should remember, also, that while legal science progresses in accordance with its overcoming the influence of technical rules by supplementing them with new laws and rules as their defects appear, yet technical rules must ever exist, because of the fact that it is impossible for man to create laws which will be certain to apply with absolute justice to all the cases which are to arise under them; and his amendments to any law, whose failure of proper application experience has exhibited, are necessarily subject to the same inherent defect.

Nevertheless, great care should be used by the modern legal critic in declaring that the shortcomings of the Law are to be attributed to the Technicality. Directly the converse is true. For although, as we noted above, the Law makes progress in accordance with its discarding rules which can be applied with justice in a given number of cases for rules applicable in a greater number of cases, yet technical law is desirable, even though it is inevitable. For, as we have pointed out, the Law when in a technical status is in that status in which most justice may be rendered and the maximum number of cases covered. For in adhering to technical Law, we refuse to allow to be destroyed those rules which experience has taught man are the right and just ones for the greatest number of cases. Human learning, experience, and discrimination have builded legal science, and to discard scientific Law and adopt the plan of trying to make individual rules for every case which arises, would simply mean the rejection of all reason, and would result, even if so fanciful a thing were possible, in such conditions of chaos that justice would be a thing unheard of. It would certainly be foolhardy for man to set aside what may be correct, what experience declares will most probably be correct, for that which offers no certainty at all.

Such, then is the sope of justice outside of technical Law. The greatest security possible of attainment lies in applying the Law as it has been builded scientifically; in that status in which it exists as the monument of human experience. Countless defects arise in the Law, as they arise in all the sciences; and these are being overcome more and more all the time. It would be difficult for the critic to present a greater record of progress than has been the Law's —if indeed there be any. For it has grown from a condition of mere arbitrary decree, to one in which it reaches out its powerful

arm into all human affairs. The Law today permeates nearly every interest of man, and guides society throughout its complex and manifold system of affairs—by rules; rules which compel the vague and uncertain conditions of life to yield to those which carry within them sins of certain benefit, those democratic ones having as their end—*the greatest good to the greatest number.*

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A REVIEW OF GEN. CROWDER'S LETTER ON MILITARY JUSTICE.

Col. John H. Wigmore has sent to the members of the American Bar Association a letter prepared by Maj. Gen. Enoch H. Crowder, addressed to the Secretary of War, entitled: "Military Justice During the War." Presumably, it is expected that in publishing the views of the Judge Advocate General on this important subject, and furnishing copies to the American Bar, that this pamphlet is to be carefully read, and it may be assumed that criticism or approval is invited from laymen. Apparently Gen. Crowder was moved to address the head of the War Department because "our system of military law became the subject of public attack on the ground of its structural defects," as expressed by the Secretary of War, although the latter assures the reader in advance that the system fully deserved the terms "law" and "justice," but that the families of the young men "in our magnificent army should be re-assured" that all is well. The Judge Advocate General comes to the Secretary's rescue by asserting that "it is necessary only to peruse the facts in order to estimate at their true value the criticism, made in haste and based upon imperfect and misleading data."

The reader is supposed to be convinced by taking the General's *ipse dixit* as facts, for he states, that in relation to cases which have been the cause of criticism because of excessively severe sentences or some other form of injustice or illegality, "I have, therefore, gathered all these cases in an appendix which schedules each case thus cited and makes such explanation as our records afford, and this schedule of individual cases I will file with you for reference." (Literal quotation) It is difficult to form an opinion on the merits as the record is to be completed, and there are no facts stated upon which to base any judgment, for the statement of the Judge Advocate General makes it plain that his conclusions are to be taken as proof positive that there was nothing wrong with the administration of justice in his department, thus: "I think that I can allay the apprehensions that have been excited by the public allusion to these cases if I take two or three of the most typical and show how groundless are the criticisms."

The objection to Gen. Crowder's statement is that it offers no facts, but argument and theories, to sustain his conclusions. He betrays his military bias by insisting that laymen accept his premises and conclusions as proof of his assertions because he is an officer of the regular army, and, therefore, his judgment must be unprejudiced and correct—should not be challenged because of self-serving declarations, error or want of facts. The rank of an officer is of decisive importance with the Judge Advocate General, for he announces that "in practice, during the present war, a commissioned Judge Advocate (whose rank is never less than that of a major or lieutenant colonel) is attached to the staff of each commander of a division," thereby implying that the rank of an officer determines his qualifications and fitness for such duties, while in fact a lieutenant in the national army might have far better knowledge of the law and greater experience and possess better judgment than an officer in the regular army of more exalted rank. It is quite natural for an officer, from the time he enters West Point as a "plebe" until he is retired, to be jealous of his rank and to assume that

qualifications are determined by title, for an officer is presumed to obtain promotion by reason of his character, ability and length of service.

A large part of the letter is devoted to an exposition of the dubious methods employed by Lieut. Col. Ansell in procuring his own appointment as Acting Judge Advocate General. It is of no special consequence to the public whether Lieut. Col. Ansell was guilty of a "surreptitious act in securing (from the Secretary of War) an order designating him as Acting Judge Advocate General." If Lieut. Col. Ansell imposed upon his superior officer and thereby obtained an appointment improperly, or even fraudulently, that is a personal affair between the two eminent army officers and the head of the War Department; the people have not complained about this, and therefore, the lenthy accusation against Lieut. Col. Ansell by his superior, Maj. Gen. Crowder, should be disregarded and considered as "irrelevent and immaterial." The old maxim—*audi alteram partem*—may well be applied, for if Lieut. Col. Ansell were heard in his own behalf, we might conclude that he had not acted "surreptitiously" but with the utmost propriety.

The controversy existing between the two officers is, of course, unfortunate; but should not have been exposed to public gaze, for "skeletons" in the closets of the military family had best be concealed. The fact is that the people are only interested in loyal and competent service rendered their country. They have not the time, inclination nor qualifications required to judge of the merits of such controversies. Whether Lieut. Col. Ansell obtained his appointment from the Secretary of War "surreptitiously" would be interesting, if true, but is of slight concern outside of army circles. This portion of the letter serves no useful purpose and should, therefore, have been omitted.

Returning to the main question relating to the administration of military justice—Gen. Crowder overstates his case. He admits that "it is plain enough that the military spirit of discipline overshadowed the sense of justice," but tries to avoid this fact, and offers as an excuse because "under the present war conditions it was not feasible to obtain officers of higher rank in any considerable numbers." The fetish of army rank is always reverted to as a determining factor whether a military duty is expected to be well or improperly performed.

It will be difficult to follow the logic of Gen. Crowder when he asserts "that nothing turns upon the nature of the command itself which is disobeyed, and that it is not the thing commanded that is material; it is the act of deliberate disobedience." Following this reasoning to a finality, if the order were to polish an officer's boots and the private should refuse or neglect to do it, or, if the command to peel potatoes were disregarded while the soldier, in either case, at the imminent risk of his life, would cheerfully have obeyed a command to clear out a machine-gun nest—nevertheless, he should be punished as severely for refusing to obey the former trifling orders, as if he had been wilfully disobedient in carrying out the latter command of great military importance. It is this peculiar view that all offenses are alike if disobedience of orders be involved, that has caused the public to mistrust military justice. Somehow the old notion "that the punishment should fit the crime" persists. It is reported that the records show that for a refusal to give up a cigarette case a sentence of twenty-five years was imposed; for disobeying an order to drill life sentences were meted out; for absence without leave (technical desertion) forty years was fixed as the penalty.

Gen. Crowder justifies such extraordinary sentences because there was no minimum, thus: "the long periods of years named in those sentences were only maximum and were therefore nominal only." Whoever heard of a sentence for forty years or of life imprisonment being "nominal only," before this announcement? As a

further justification he says: "I will even go so far as to say that probably none of these officers (who pronounce sentence) supposed for a moment that these long terms would ever actually be served."

No doubt the officers considered themselves seriously or they would have frankly told the offender: "We sentence to confinement for forty years without pay, but there is no minimum, therefore, it does not mean anything, for if you are of good behavior, you may be restored to duty in forty days or sooner and also gain promotion" as Gen. Crowder says actually happened in some cases. Under such circumstances a court-martial sentence for life must have been considered a huge joke and should be classed as a "legal fiction."

Pursuant to the Articles of War, much is purposely left to the good sense and sound discretion of trial officers. For illustration—Sect. 1963 of Barnes Fed. Code provides that "Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave, or absents himself from his command, guard, quarters, station or camp without proper leave, shall be punished as a court-martial may direct"; which is in the usual phraseology of these statutes.

We are informed by Gen. Crowder that the court-martial sentences, while not always reasonable nor proper, yet compare favorably with civil court work. Later he states that the Military Justice Division revised the sentences imposed by reducing them 89½ per cent. Now, if nine-tenths of the judgments of our civil courts were modified or reversed on appeal we would certainly admit that our trial judges were grossly ignorant of the law and wholly unfit for their positions.

In explanation of this phase it is stated that severe sentences had to be imposed to maintain discipline. To the lay mind it will be difficult to perceive what good may come from sentences so excessive as to be ridiculous and when every private and officer tacitly knows and takes for granted, as Gen. Crowder says, that "the penalty is not expected to be served nor any considerable part thereof." It is like hanging up a scarecrow to frighten the birds, that does not scare them as soon as they learn that it is a sham, and then use it to rest on.

The fact is that many of the officers detailed for court-martial service were not familiar with such work, possessed no legal training, and, therefore, scored a failure. Laws are good or bad often because of the wisdom or ignorance of the courts in enforcing them. There is no doubt that the officers acted upon their best judgment but but for lack of knowledge and experience were not able to judge accurately nor administer the law with propriety. The fault here lies with our government and not with the individual officer. There are less than fifteen hundred graduates of the West Point Military Academy in actual service, consequently tens of thousands of officers had to be selected from civil life. Had there been many more West Point graduates the probability is that the army would have had a more uniform administration of justice and there would have been less complaint because of unreasonable sentences.

The remedy lies in the proper education of young men for the military service. The wonder is not that many absurd mistakes were made, but that there were not more. It would seem that Gen. Crowder might well have admitted that our system of military justice in practice was deficient and should be reformed and modernized; but to attempt to bolster up absurd sentences and antiquated procedure, contrary to the ordinary sense of justice and fairness upon the specious plea that justice is negligible, but that discipline overshadows everything, is not inspiring confidence. Army officers have stated publicly that 94 per cent of the privates brought to trial were convicted, while only 30 per cent of the officers tried are found guilty. Apparently this shows partiality towards the officers, but it is

claimed that such result follows from more careful trials and more skillful defenses on behalf of the officers; whether privates should have the same privilege remains to be determined.

After a careful perusal of Gen. Crowder's letter one is forced to the conclusion that there is something wrong with military justice in our army, if for no other reason than that "he doth protest too much." Every practicing attorney has had to dissuade clients from rushing into print. As a rule nothing is gained by trying a contested question in the newspapers. The Judge Advocate General would have done better if he had ignored the attacks made upon him personally and the system, but should have endeavored to remedy such defects as might have become apparent.

No doubt some good will come from this turmoil. The public are inclined to believe that military law and procedure need reforming and modernizing and that officers specially trained should be entrusted with the duties of administering military justice. Necessarily many officers were in the service with meagre training and little experience. This accounts for sentences of twenty and forty years, where perhaps guardhouse punishment would have met the case. To sentence a man to thirty years' confinement as a maximum but let him out in as many days appears to the ordinary citizen as a travesty.

We should remember, however, that a great emergency existed; armies larger than ever dreamed of had to be taken from civil life and fitted for the duties of a soldier in an incredibly short time. Commanders for these battalions had to be trained practically while en route to the field of battle. The marvelous thing is that all this was accomplished in such remarkably short time. History will show a brilliant record, and laud our army and navy for their amazing victories; the nation will profit from any defects that may have been discovered, and will attempt to apply a remedy.

The results speak for themselves. Gen. Crowder, the author of the select service law, in the capacity of Judge Advocate General and also as Provost Marshal General performed highly honorable services and herculean labors. That there should be criticism is a natural expectation, but that does not detract in the least from the merits of the magnificent work done by him, nor diminish the credit which is justly his due.

We perhaps should conclude here, but as often happens, one who is counsel in his own cause lacks proper perspective. Gen. Crowder makes "recommendations" for changes and improvements. He evidently would prefer that the American Army be tried for offenses under a foreign system, and that this country should specially follow the practice of a European nation in administering military justice. With this object in view he offers only these suggestions which may be epitomized as follows:

Proposition 1. "That the accused be confronted with witnesses, and prepare a summary of the evidence and settle upon it in agreement with the accused, substantially as in the British practice."

Proposition 2. That the Articles of War be amended so as to "increase the importance and the powers of the special court-martial—like the British court-martial."

Proposition 3. That these changes would increase "special courts-martial and decrease the general courts, as in the British Army."

Proposition 4. Providing for "a general order modeled after the practice of the British field general court-martial."

It is rather distressing, and a reflection upon our intelligence, in fact, humiliating to our pride of achievement as a nation that we should be advised by our distinguished Judge Advocate General that the best he can suggest is to adopt the British system of military justice en bloc. Surely an exotic plan that permitted traffic in army commissions for a price, only a few years ago; one that opens the portals easily to high army office on conditions of birth, but shuts

them almost entirely against real merit, if of humble origin; where a private soldier in ordinary times is not tolerated in the same railway compartment with a commissioned officer—is not a military system that will appeal to, nor be approved by the patriotic citizens and the brave and loyal soldiers of this Great Republic.

Let us have courts-martial in the army according to the American standard of right; in the words of Gen. Crowder himself, let us have "a genuine and adequate system of military justice, founded upon the Constitution of our forefathers and the Acts of Congress of our contemporaries."

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CORPORATION—FRAUD IN ORGANIZATION.

MOE et al. v. HARRIS et al.

Supreme Court of Minnesota. May 23, 1919.

172 N. W. 494.

(Syllabus by the Court.)

When the organization of a corporation has been completed as required by statute, a corporation de jure is brought into existence, notwithstanding the fact that no capital stock was subscribed or paid for, no books were kept, no by-laws adopted, and no meetings held or officers elected.

LEES, C. Appeals from order sustaining a demurrer to plaintiffs' complaint on the ground that it stated no cause of action. The facts as alleged were, in substance, as follows: In September, 1911, articles of incorporation and proof of their publication were filed in the office of the secretary of state by three of the defendants, who attempted to organize a corporation known as the "Yale Mining Company." The defendants who caused this to be done were named in the articles as directors and officers of the corporation, to serve until their successors were elected and had qualified. No subsequent election of directors or officers ever took place, and such defendants still hold their offices. In March, 1916, plaintiffs recovered a judgment against the company for $1,852.74, on which an execution was issued and returned unsatisfied. Such judgment was for the value of drilling and exploration services rendered under a contract between plaintiffs and the company. Two other persons, also named as defendants, with the knowledge of the officers and in behalf of the company, conducted the negotiations leading up to the making of the contract.

The officers named in the articles of incorporation never perfected the organization of the corporation by opening books to receive stock subscriptions or by adopting by-laws, and never paid in any money. Plaintiffs believed that the corporation had been organized in compliance with the laws of Minnesota, and but for such belief would not have performed the services referred to. The defendants held themselves out as a corporation to defraud plaintiffs and to induce them to believe that a corporation had been legally organized, and that they were its stockholders and directors, whereas in fact no stock had ever been subscribed or paid for, and defendants were copartners doing business in the guise of a corporation. Judgment was demanded for the amount of the recovery against the company.

The single question presented by the briefs and argument may be thus stated: Was the Yale Mining Company a corporation de jure or de facto, and therefore capable of making the contract with plaintiffs under which they rendered the services for which they seek to recover? It it was, it is manifest that the complaint states no cause of action against the individual defendants as copartners or otherwise.

Counsel for appellant insist that upon the facts stated, it appears that there was merely an attempt to organize a corporation, not followed by a user as a corporation because no capital stock was subscribed or paid for, no by-laws were adopted, no books kept, and no meetings held or officers elected. Johnson v. Corser, 34 Minn. 355, 25 N. W. 799, Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552, and Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147, are cases cited as being in point.

On the other hand, respondent cites G. S. 1913, § 6149, reading in part as follows:

"Upon filing with the secretary of state proof of such publication, its corporate organization shall be complete"

and asserts that since such proof was filed, a corporation de jure was organized, and, if not, under the three cases appellant cites, there was at least a corporation de facto.

We are of the opinion that the statute referred to controls, and that a corporation de jure was organized. If so, it is difficult to see how the subsequent failure of its organizers and officers to hold meetings, adopt by-laws, issue stock, and refrain from making contracts until the corporation had paid in capital amount to such a noncompliance with the laws of this state, or such a nonuser of the corporate franchise, as to give plaintiffs a right of action against them individually or as copartners. The statute does not make it a condition precedent to the right of a corporation to transact business that all or any of its authorized capital stock shall be subscribed or paid in.

Plaintiffs' grievance is that the corporation has no money, property, or stockholders, and hence they cannot collect their judgment against it. Walton v. Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355, is the only case cited to sustain their alleged cause of action. In the course of the opinion, it was there said that no portion of the capital stock had been subscribed and no books opened as required by Paragraph 1173, General Statutes of Kansas for 1889, and that a Kansas corporation could not proceed to transact any business without a portion of its capital stock being subscribed or paid in. The absence of such a statutory requirement in this state deprives the case of persuasive force as authority here.

Under a statute similar to ours a complaint almost identical with the one before us was held bad on demurrer. Singer Mfg. Co. v. Peck, 9 S. D. 29, 67 N. W. 947.

In First National Bank v. Almy, 117 Mass. 476, it was held that an action might be maintained and judgment rendered against a corporation upon a debt contracted before its capital stock had been paid in, notwithstanding the fact that the statute prohibited corporations from transacting business until the whole amount of the capital stock had been subscribed and paid for. Other cases in point are Am. Radiator Co. v. Kinnear, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453; Laflin, etc., Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522; Stokes v. Findlay, Fed. Cas. 13478. See also, 10 Cyc. 230.

Couisel for appellants insist that if the demurrer is sustained their clients are left without a remedy, notwithstanding the meritorious nature of their claim, and have a judgment against a nominal corporation which cannot be collected. If they relied on the responsibility of the corporation because of false representations made by any of the defendants, they may have a cause of action against them for damages for fraud, if it is not barred by the statute of limitations. Further investigation may result in the discovery of assets of the corporation which may be reached by execution, but relief cannot be had in the present action. The court was right in sustaining the demurrer, and its order is hereby affirmed.

NOTE.—*Fraud in the Organization of a Corporation Making its Stockholders Liable as Partners.*—The complaint in the instant case charges, in effect, that the corporation referred to was a means whereby the members held themselves out to the public as partners and that they were bound for the debts created by the corporation. The court holds that this was not true, because the statute says: "Upon filing with the secretary of state proof of such publication, its corporate organization shall be complete." In other words, the court declares that upon the filing of such proof "a corporation *de jure* was organized." I think that this carries legislative intent far beyond what could have been contemplated. It was not meant that *ex parte* proof to be furnished a mere administrative officer should cover actual fraud and had it been intended that it should, the statute to this extent would be unconstitutional.

But the court refers to Singer Mfg. Co. v. Peck, 9 S. D. 29, 67 N. W. 947, as a case directly supporting its conclusion. But, passing by the question of that case having been correctly or not decided, it is different from the instant case, in that in the latter it was averred that: "The defendants held themselves out as a corporation to defraud plaintiffs and to induce them to believe that a corporation had been legally organized and that they were its stockholders and directors, whereas, in fact, no stock had ever been subscribed or paid for, and defendants were co-partners doing business in the guise of a corporation." In the cited case it is said, as showing no fraud by the corporation: "In the case at bar it does not appear that the corporation did anything they were not fully authorized to do under the statute, *or that they by act or word made any representations they were not legally authorized to make.*"

In Swofford Bros. D. G. Co. v. Owen, 37 Okla. 616, 133 Pac. 193, L. R. A. (N. S.) 1916, 189, the action was against stockholders as partners, in a case where there was a *bona fide* attempt to organize a corporation for a lawful purpose, and the only defect in organization was a failure to file a duplicate copy in a certain other office, and all of this was followed by actual use of franchise for a number of years. A complaining creditor dealt with it for several years, until the corporation became bankrupt. Under these circumstances there was *bona fides* and to hold otherwise would be subjecting stockholders to unknown perils and making hardship on innocent parties intolerable. There was nothing in the case which militated in any way against the presumption as to full reliance on the assets of the corporation itself. In the instant

case there was never anything but a shell and no assets behind it.

There is a rule sustained by the weight of authority that no partnership liability exists where there is a colorable attempt in good faith to organize a corporation and use its franchise in pursuance thereto. First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761, was a case where suit was against stockholders of a corporation as partners where it was alleged certificate of incorporation was "obtained by fraud and deceit" in that the capital stock was never in fact paid up. This charge is disposed of by saying: "*Non constat* it may have been paid in full at the time of the organization of the company by the meeting of the directors and the election of officers, including a treasurer." Then the court treats the contention that "there was and is no corporation and seeks to hold the defendants in an inherited liability as co-partners." Then are discussed Missouri cases proceeding on the assumption of some bona fide attempt by stockholders and incorporators to comply with the statute, and they were all distinguished from cases where "corporations were clearly organized in fraud" of law.

In Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249, it was said by Chief Justice Sterrett that: "It is essential to the creation of a corporation that all material provisions should be substantially followed and exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt." In that case a certificate had been granted, but it was not recorded in the county where it was to do business, and it was not pretended dealers with the corporation knew anything of its existence as such.

Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. (N. S.) 872, says that it does not follow that because incorporation is a fraud on the state, it also is a fraud on individuals dealing with it. While this may be true, yet can it be said that where a complaint charges that the purpose of a pretended corporation is to defraud individuals crediting it, that the fraud only gives right to a state to question its existence?

Thus, in McBryan v. Universal Elevator Co., 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453, it was said: "The wrong was done by the original incorporators in making a false statement as to the amount of stock actually paid in. The public and creditors dealing with the corporation had the right to rely upon this statement as true. * * * It would be a disgrace to the law if creditors dealing with the corporation in reliance upon these statements, which they examine in the public offices where they are on file, have no remedy." To the same effect seems to be Burns v. Beck, 83 Ga. 471, 10 S. E. 121.

As to whether the making of a false statement regarding payment of subscriptions amounts to deceit, it was said in an extended note in 6 L. R. A. (N. S.) at page 876, that: "Conceding the soundness of the doctrine adopted in Webb v. Rockefeller (supra), it clearly would not prevent the maintenance of an action for deceit against the officers, if, by some act in addition to the making and filing of the report, they should make use of it as a means of deceiving persons dealing with the corporation," which appears to me a very just observation. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION NO. 168.

Privileged Communications; Relation to Client; War—Disclosure of confidential information upon demand of Alien Property Custodian; Conditions indicated.—In the opinion of the Committee may an attorney, who was lawfully employed during peace by a person now an alien enemy, disclose, without the consent of his client, confidential information received from the client in the course of his former employment, upon the demand of the Alien Property Custodian or his local representative or agent?

ANSWER NO. 168.

The Committee does not assume to express any opinion respecting the proper construction of the Trading with the Enemy Act, or the constitutionality of any of its provisions; nor can it assume to determine whether it was the purpose or intent of Congress to abrogate the privilege of the client (though an enemy or ally of enemy), or whether the declaration of war abrogates such privilege. It is of the opinion that the attorney cannot waive the privilege, but that the primary responsibility of determining the question of the abrogation is upon those charged under the law, and under the rules and regulations promulgated by the President, with the duty of administration. It is, consequently, of the opinion that when called upon to disregard the privilege, the attorney should assert it in behalf of his client, whose privilege it was; and that he may, with propriety, comply with the determination of the functionary charged with the administration of the law and acting under color of his office.

Since the Committee does not undertake to decide upon either the construction of the law or the constitutionality of its provisions, it is of the opinion that a lawyer who believes that the power to abrogate the privilege has not

been delegated to the functionary, and who desires in good fatih to test the valdity or interpretation of the law by refusing to answer and abiding the consequences of refusal, may without professional impropriety do so.

QUESTION NO. 169.

Privileged Communications; Relation to Client—Disclosure of confidential communication relating to the improper payment of money to secure preferential treatment after induction into military service—Conditions indicated.—In the opinion of the Committee may an attorney, without the consent of his client, disclose to the proper authorities of the United States, information received from a client in the course of confidential employment respecting a past transaction, that the client has paid money for a promise to secure his preferential treatment after induction into the military service of the United States?

ANSWER NO. 169.

In the opinion of the Committee, the disclosure should not be made without the consent of the client. The facts do not seem to the Committee to differentiate the case from the legal duty of preserving confidences of a client respecting past crimes.

BINDING DECLARATION OF RIGHTS.

So many lawyers have become interested in the subject of declaratory judgments by reason of the article of Prof. Edson R. Sunderland in 88 Cent. L. J. 6, that we append herewith the full report of a bill which recently passed the Michigan legislature involving this new idea in American procedure. Although we have been informed of the pendency of other bills in other legislatures, providing for declaratory judgments, Michigan, so far as we are advised, enjoys the distinction of being the first state to extend the jurisdiction of its courts to other than coercive proceedings. The following is the act complete:

An act to authorize courts of record to make binding declaration of rights.

The People of the State of Michigan enact:

Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

Section 2. Declarations of rights and determination of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

Section 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

Section 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

Section 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

Section 6. This act is declared to be remedial, and is to be liberally construed and liberally administered with a view of making the courts more serviceable to the people.

PROGRAM OF THE MEETING OF THE NORTH CAROLINA BAR ASSOCIATION.

The twenty-first annual meeting of the North Carolina Bar Association will be held at Greensboro, N. C., August 5, 6 and 7, 1919. Headquarters will be at the O. Henry Hotel.

The President's address will be delivered by Mr. E. F. Aydlett, of Elizabeth City, at 8:30 Tuesday evening.

There will be addresses by the following: Lieutenant-Colonel Samuel T. Ansell, of the United States Army; Mr. H. F. Seawell, of

Carthage; Mr. Julius C. Martin, of Asheville; Mr. Garland S. Ferguson, of Waynesville; and by Hon. T. W. Gregory, former United States Attorney-General.

BAR ASSOCIATION MEETINGS FOR 1919—WHEN AND WHERE TO BE HELD.

American—Boston, Mass., September 3, 4, and 5.

Missouri—Kansas City, Mo., October 3 and 4.

North Carolina—Greensboro, August 12, 13, and 14.

Washington—Spokane, July 31.

West Virginia—Fairmont, July 22 and 23.

BOOKS RECEIVED.

American Law Reports, Annotated. Editors in Chief, Burdett A. Rich and M. Blair Wailes; Consulting Editor, William M. McKinney; Managing Editors, H. Noyes Greene, Henry P. Farnham and George H. Parmele, assisted by the exceptionally experienced editorial organizations of the publishers. Vol. 1. Lawyers Co-operative Publishing Company, Rochester, N. Y. Edward Thompson Company, Northport, L. I., N. Y. Bancroft-Whitney Company, San Francisco, Cal. 1919. Price, $7.50 per volume. Review will follow.

Principles of Foreign Trade. By Norbert Savay, M. A., LL.B. Member of the New York Bar; formerly special lecturer on Foreign Trade, Notre Dame University; formerly counsel for Russian Consulate General. New York. The Ronald Press. 1919. Price, $4.00. Review will follow.

Corpus Juris. A complete and systematic statement of the whole body of the law as embodied in and developed by all reported decisions. Edited by William Mack, LL.D., Editor-in-Chief of the Cyclopedia of Law and Procedure, and William Benjamin Hale, LL.B., contributing editor of the American and English Encyclopedia of Law and the Encyclopedia of Pleading and Practice. Volume XVIII. New York. American Law Book Company. 1919. Review will follow.

HUMOR OF THE LAW.

A Jersey City, N. J., counselor asked his new stenographer to address a letter to the "Commissioner of Internal Revenue, Washington, D. C.," with this result: "Commissioner of Eternal Revenue, Washington, D. C."—R. S. R., in The Docket.

Chief: We will have to dismiss Officer Blank.

Commissioner: What! He is a discharged soldier with a record for bravery.

Chief: That's just it. Last night Mr. Brown called him and he said there was a burglar in his house. Blank asked him if the burglar had a machine gun, and when Brown said, "No," he told him to take the burglar himself; he did not need a cop.—Indian, A. E. F.

One of our subscribers sends us a letter he recently received, which is as follows:

"Dear Sir: Does the law of this state uphold a woman to have three living lawfull husbands or a man with the same number of wifes. I am having sum trubble in my church relitive to the ques. Please answer question and cost of advise by return mail."

There need be but little trouble in figuring out one's income tax. In the first place it may be worked out by algebra, astronomy, trigonometry and syntax, and then your answer may be correct, and it may not. If your income is $2,400 a year, and you have a diamond ring and an automobile, and are married to a brunette girl 26 years old, you take the amount of your income and add your personal property, subtract your street number, multiply by your wife's height and divide by your telephone number. If you have a child in the family, you subtract $200 from your income, add the amount of your personal property, multiply by your waist measure, subtract the size of your collar and your child's age, multiply by the amount you have given the church during the year, and divide by the number on your automobile license tag. If there is a second child you deduct $400 from your income, add the weight and age of each child, divide by the date of your birth, multiply by the size of your hat, and subtract the weight of your mother-in-law. After you get it all figured out you won't have to pay any taxes of any name or nature, for they will have you in the booby hatch and strapped down.—Wall Street Journal.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assignment for Benefit of Creditors**—Independent Contract.—While the right rests in the assignee, in the interests of creditors, to refuse to perform an improvident contract made by his assignor, yet he so far stands in the place of the assignor that he cannot repudiate the contract and keep the subject-matter of the contract for the benefit of the creditors, and at the same tme retain the benefits received from the contract for the benefit of crditors.—Lathrop v. Specht, Iowa, 172 N. W. 296.

2. **Bankruptcy** — Preference. — Bankruptcy Act, §§ 1 (8), 2, 23b, 60b, authorize suits by a bankrupt's trustee to recover preferences under sections 67b, 67e, and 70e (sections 9651, 9654) to be brought in the federal District Court of the district where the real and personal property is located, although the bankruptcy proceedings were instituted, and defendant resides in another district in the same state.—Collett v. Adams, U. S. S. C., 39 S. Ct. 372.

3.——Want of Notice.—Bankrupt's discharge is not operative against a creditor, who had no notice or actual knowledge of proceedings in bankruptcy, and whose claim was not duly scheduled, but mere want of such notice or knowledge will not prevent discharge from becoming operative, if debt was duly scheduled. —Travis v. Sams, Ga., 99 S. E. 239.

4.——Willful Fraud.—Where defendant, when he executed a note to plaintiff prior to being adjudged a bankrupt, represented that he owned an interest in a store, which was true at the time, the fact that a month or so after such representation he sold his interest without notice to plaintiff did not amount to fraud so as to permit plaintiff to recover on the note, under Bankruptcy Act July 1, 1898, § 17, providing that a bankrupt is not discharged from a debt contracted by fraud; the representation not being a continuing one.—Gregory v. Pierce, Iowa, 172 N. W. 288.

5.——Willful Fraud.—The word "willful," within Bankruptcy Act, § 17a (U. S. Comp. St. § 9601), providing that bankruptcy discharge shall not release judgments in tort for willful and malicious injury to the person, means intentional, though in criminal actions the word may have a different and darker shade of meaning. —Ex parte Cote, Vt., 106 Atl. 519.

6. **Banks and Banking**—Charter Provisions.— The execution of notes in consideration of national bank stock is not compliance with constitutional and statutory provisions requiring "cash" to be paid therefor.—Citizens' Nat. Bank of Stamford v. Stevenson, Tex., 211 S. W. 644.

7.——Rules and Regulations.—A rule of a bank accepting deposits in its savings department that payment to a person presenting a passbook should be valid on account of owner, unless book has been lost and written notice of loss given to bank before payment, is reasonable and binding on depositors.—Wilson v. Citizens' & Southern Bank, Ga., 99 S. E. 239.

8. **Bills and Notes**—Contribution.—Any of joint accommodation indorsers of note paying more than his share has right of contribution from the others.—Hurlbut v. Quigley, Cal., 180 Pac. 613.

9.——Fraudulent Representation.—Fraudulent representations inducing the execution of a note do not constitute a defense against a bona fide purchaser.—Lapp v. Merchants' Nat. Bank of Indianapolis, Ind., 123 N. E. 231.

10.——Law Merchant.—Under the law merchant, a written promise, to be negotiable must be only for the payment of money in a fixed sum at a definite time to the bearer or holder thereof.—Kirkpatrick v. Lebus, Ky., 211 S. W. 572.

11. **Brokers** — Duration of Appointment. — Where contract giving broker right to sell property at certain price for certain commission did not specify duration thereof, owner could terminate contract at any time before broker procured purchaser ready, willing, and able to purchase on the terms stated in his contract.— Roth v. Thomson, Cal., 180 Pac. 656.

12.——Exclusive Agency.—That a contract may give a broker the exclusive right of sale, such right must be given to the broker on unequivocal terms or by necessary implication.— Ritch v. Robertson, Conn., 106 Atl. 509.

13.——Producing Purchaser.—A broker is entitled to his commission, when he procures to his principal a customer ready, willing, and able to buy on the terms provided by such principal, within the period allowed, or, if the time is not limited, before the revocation of the agency.— Eldorado Coal Co. v. Rust & Shelburne, Ala., 81 So. 567.

14. **Cancellation of Instruments**—Laches.— Where an invalid conveyance to a son was made about six years before grantor's death, and action was brought by other heirs a few months

after grantor's death, there was no laches.—Chamberlain v. Frank, Neb., 172 N. W. 354.

15. **Carriers of Goods**—Bill of Lading.—If a draft be drawn with bill of lading attached, the title to the shipment vests in the holder of the draft as security for its payment, and if by default of the carrier the security be lost or converted, the right of the holder to recover from the carrier would be limited to the value of the thing lost.—Peninsular Bank of Detroit v. Citizens' Nat. Bank of Knoxville, Iowa, 172 N. W. 293.

16. **Carriers of Passengers**—Connecting Line.—Carrier which contract as principal to carry passenger to a destination over its own line and a connecting line is liable for injuries sustained by reason of torts or negligence of connecting carrier while completing contract of transportation.—Pugh v. Washington Ry. & Electric Co., Md., 106 Atl. 522.

17.——Contributory Negligence.—Petition, in action for personal injuries, averring that plaintiff stepped partly on the track to signal defendant's interurban car to stop, and, upon receiving what she understood was the usual response that it would stop, was struck and injured while getting away from the truck by the car passing by at a great speed, does not show on its face that plaintiff was guilty of contributory negligence.—Texas Electric Ry. v. Hooks, Tex., 211 S. W. 654.

18.——Intoxication.—To charge a carrier with greater care in the transportation of a passenger by reason of his intoxication and incapacity, it must appear that carrier knew his condition, not merely that it ought to have known it or could have learned it by care.—Ingerson v. Grand Trunk Ry., N. H., 106 Atl. 488.

19. **Chattel Mortgages**—Lien.—Where judgment creditor caused execution to issue and be levied upon automobile in possession of judgment debtor, his lien attached at time of levy and was superior to lien of unregistered chattel mortgage on automobile of which he had no notice at such time, notwithstanding notice at time of execution sale.—Alsbury v. Alsbury, Tex., 211 S. W. 650.

20. **Conspiracy**—Concerted Action.—A "conspiracy" is a combination of two or more persons by some concerted action to accomplish an act or purpose which by statute is defined to be a felony.—Williams v. State, Ind., 123 N. E. 209.

21.——Evidence.—One charged with conspiring with several may be convicted on proof of his conspiracy with some of them.—Hardy v. United States, U. S. C. C. A., 256 Fed. 284.

22. **Contracts**—Candidate for Office.—Under common law of United States and the public policy of Nebraska, two rival candidates for public office cannot lawfully make a contract or political deal that one shall withdraw his candidacy in favor of the other who if elected will appoint him to a public office.—Hand v. Willard F. Bailey Co., Neb., 172 N. W. 356.

23.——Condoning Fraud.—Fraud which renders a contract voidable may be waived or condoned, and the contract ratified by the party defrauded.—Zundelowitz v. Waggoner, Tex., 211 S. W. 598.

24.——Subscription to Newspaper.—Evidence, in action for subscription price of newspaper, held not to require finding of implied contract by acceptance and use of newspaper delivered to defendant.—Legal News Pub. Co. v. George C. Knispel Cigar Co., Minn., 172 N. W. 317.

25. **Corporations**—Authority of Officer.—Where negotiable instrument is payable to corporation's order and is indorsed by its officer in corporate name and given as collateral for a loan to himself individually or to another corporation in which he is interested, the facts are sufficient, in view of Rev. St. 1913, § 5374, to put lender on inquiry as to officers' actual authority to make transfer.—Bank of Benson v. Gordon, Neb., 172 N. W. 367.

26.——Contracts.—In construing compensation contract between corporation and its manager, the meaning must be determined, in some measure at least, by the interpretation placed upon it by the parties themselves during nearly ten years of conduct of the business of the corporation by the manager.—Cuneo v. Giannini, Cal., 180 Pac. 633.

27.——Repurchase of Stock.—A corporation's contract to repurchase its stock at purchaser's option, made as a consideration for purchase of stock, is unenforceable as against corporation if such enforcement would be to prevent the payment of creditors in full.—Hoover Steel Ball Co. v. Schaefer Ball Bearings Co., N. J., 106 Atl. 471.

28.——Suspension of Business.—The mere suspension of a land company's business of improving streets and selling lots during a period of industrial disturbance and depression does not constitute an abandonment of the corporate purpose, or demonstrate a failure of even a part of the corporate activities, or justify dissolution proceedings by minority stockholders.—Miller v. Herzberg, Ala., 81 So. 555.

29. **Covenants**—Enjoyment.—A covenant that the lot conveyed should be used for church purposes only was a covenant running with the land, since its performance or nonperformance affected the mode of enjoyment of the granted premises, and their value or quality.—White v. Harrison, Ala., 81 So. 565.

30. **Criminal Law**—Good Character.—Where in a doubtful case witnesses to accused's good character on cross-examination testified as to having heard accused charged with other offenses, it was prejudicial error for the trial court not to admonish the jury that the sole purpose of the evidence was to test the accuracy and credibility of the witness, and not to show defendant's guilt.—Copley v. Commonwealth, Ky., 211 S. W. 558.

31.——Motive.—Failure to discover or prove motive therefor is no evidence of innocence, motive constituting no element of the crime itself.—State v. Lemon, W. Va., 99 S. E. 263.

32.——Res Gestae.—Acts and declarations by accused on receipt of stolen goods or on his arrest while the goods are in his possession are parts of the res gestae, and admissible whether they are for or against him.—State v. Baker, W. Va., 99 S. E. 252.

33.——Transporting Liquor.—In a prosecution for unlawfully transporting liquor into a prohibition state by automobile, evidence of a prior trip made by the same persons between the same places a few days before, and connected with the one charged, held admissible as showing motive.—Malcolm v. United States, U. S. C. C. A., 256 Fed. 363.

34. **Damages** — Mental Suffering. — Where plaintiff alleged that he was permanently injured, in that all the fingers of his left hand were severed, causing intense suffering and crippling him for life, a charge that, as part of mental suffering, jury might consider deformity, was proper.—Social Circle Cotton Mill Co. v. Ransom, Ga., 99 S. E. 238.

35. **Deeds**—Delivery.—As between the parties, where there is a complete delivery of deeds by grantor to grantee without condition or reservation, the title passes to grantee, irrespective of whether delivery is accompanied by change of possession.—Knox v. Kearney, Cal., 180 Pac. 661.

36.——Quit Claim.—Where grantor of quitclaim deed had no interest in the property described therein at the time of its execution and delivery, the deed conveyed nothing.—Bunch v. Johnson, Ark., 211 S. W. 551.

37.——Undue Influence.—Undue influence is a species of constructive fraud, and depends upon the circumstances of each particular case, but stronger proof is required to raise a presumption of undue influence in the case of a will than in a deed.—Pilcher v. Surles, Ala., 81 So. 585.

38. **Divorce**—Corroboration of Parties.—Divorce cannot be granted upon uncorroborated testimony of the parties.—Parmly v. Parmly, N. J., 106 Atl. 456.

39.——Modifying Decree.—District court may modify divorce decree at a term subsequent to that at which it was rendered, by transferring custody of infant child of the parties from one to the other.—Milner v. Gatlin, Tex., 211 S. W. 617.

40. **Easements**—Prescription.—One complaining of obstruction of prescriptive way across another's land must show an uninterrupted use of way for more than 7 years, that it was not more than 15 feet wide, that it is the same 15 feet as originally laid out, and that he has kept it open and in repair.—Hays v. Hays, Ga., 99 S. E. 230.

41. **Estoppel**—Inconsistency.—To defeat a liability, a party will not be heard to say that he never made the contract, and, inconsistently therewith to retain the benefits from the alleged transaction.—Massachusetts Bonding & Ins. Co. v. Vance, Okla., 180 Pac. 693.

42. **Executors and Administrators**—Situs.—Where an owner of stock in a national bank having its domicile in Missouri died testate in Illinois having the certificate thereof in her possession, the situs of the property represented by the certificate for administration purposes was in Missouri.—Troll v. Third Nat. Bank of St. Louis, Mo., 211 S. W. 545.

43. **Fraud** — Misrepresentation. — Ordinarily misrepresentation of a material fact is sufficient to support an action for fraud, whether the person making it knew that it was false or not, one making a statement of fact as basis of negotiations being bound to know whether it is true, and bad faith not being a necessary element.—Zundelowitz v. Waggoner, Tex., 211 S. W. 598.

44. **Gaming**—Future Contract.—A contract for the purchase of cotton, not intended by the parties to be settled by paying or receiving a margin or profit, but contemplating an actual delivery and payment, was not illegal as a future contract under Vernon's Ann. Pen. Code 1916, arts. 528-547.—Puckett v. Wilson Bros. Mercantile Co., Tex., 211 S. W. 642.

45. **Garnishment**—Garnishable Debt.—The indebtedness of a trustee to the principal defendant is to be ascertained as of the date when it was due and payable.—Reynolds v. Missouri, K. & T. Ry. Co., Mass., 123 N. E. 235.

46. **Gifts**—Causa Mortis.—A "gift causa mortis" is one made by donor under apprehension of death, revocable during donor's lifetime, and which will revert to him in case he shall survive the donee or shall be delivered from peril of death in which it is made.—Harriman v. Bunker, N. H., 106 Atl. 499.

47.——Oral Gift of Land.—To establish an oral gift of land, the burden of proof is on the plaintiff to prove all the elements essential to a consummated gift.—Hagerty v. Hagerty, Iowa, 172 N. W. 259.

48. **Habeas Corpus**—Jurisdiction.—In the absence of exceptional conditions, other competent courts may not be passed by, and the original jurisdiction of the Supreme Court invoked for, redress by habeas corpus.—In re Tracy, U. S. S. C., 39 S. Ct. 374.

49. **Homestead**—Abandonment.—Under Texas decisions, removal from homestead, to constitute abandonment of it, must be shown to have been coupled with an intention never to return.—Dunn v. Eckhardt, U. S. C. C. A., 256 Fed. 315.

50.——Abandonment.—Under Const. art. 16, § 50, it is only the homestead which the husband is forbidden to sell, and land having once been used for the purposes of a home retains its homestead character until lost by abandonment.—Hudgins v. Thompson, Tex., 211 S. W. 586.

51.——Wife's Property.—A house owned by the wife cannot be claimed by the husband as his homestead.—Powers Clothing Co. v. Smith, Ala., 81 So. 576.

52. **Homicide** — Dying Declaration. — Statements of deceased shortly before death are admissible as dying declarations, where it clearly appears that he was aware of his physical condition, and did not believe that he could live.—Mason v. State, Tex., 211 S. W. 593.

53. **Indictment and Information**—Charging Crime.—Generally, particularity in charging a crime is required in order to give identity and certainty to transactions upon which pleading is based, and thereby enable accused to plead his conviction or acquittal in bar of another prosecution for same offense, and when that is done the rule is satisfied.—Williams v. State, Ind., 123 N. E. 209.

54. **Innkeepers**—Common Law.—By adoption of common law as part of law of Indiana, innkeepers acquired right to assert their common-law lien on goods brought into the inn by a guest for board and lodging furnished the latter at his request, though the goods were not the property of the guest, provided the innkeeper was not aware of the fact, a proviso not applicable under all circumstances where the guest was the agent or servant of the owner.—Nicholas v. Baldwin Piano Co., Ind., 123 N. E. 226.

55.——Strict Liability.—An innkeeper though held to a very high degree of care for goods of his guests does not incur such strict liability except to one who sustains the relation of a "guest," and he may be an innkeeper to some persons, "guests" as such, and only a lodging house keeper as to others.—McIntosh v. Schops, Ore., 180 Pac. 593.

56. **Insurance**—Accident Policy.—Where accident policy was issued for husband and wife, misrepresentation of wife's age had no effect upon contract insuring husband, the policy being separable into two distinct contracts of insurance, one insuring husband, and the other the wife.—Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., Cal., 180 Pac. 607.

57.——Assignment.—Where a husband or parent takes out a policy of insurance payable to his estate, he can make an assignment thereof either orally or in writing.—Brown v. Farmer's State Bank, Ind., 123 N. E. 224.

58.——Breach of Warranty.—Breach of insured's warranty will avoid his policy, though such breach does not contribute to the loss.—Franklin State Bank v. Maryland Casualty Co., U. S. C. C. A., 256 Fed. 356.

59.——Public Policy.—Loan agreement, providing that, upon insured's failure to pay premium when due, insurer without notice or demand could foreclose pledged policy by deducting amount of loan from reserve on the policy and apply balance to purchase of paid-up policy, is valid, not being contrary to public policy, and the loan constituting good consideration.—Cooper v. New York Life Ins. Co., Mo., 211 S. W. 548.

60. **Interest**—Unliquidated Damages.—Interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment on verdict to be had in order to ascertain the amount of same.—St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Robison, Okla., 180 Pac. 702.

61. **International Law**—Part of Contract.—International law is a part of the law of the United States, and must be administered whenever involved in causes presented for determination, though in a state court.—Riddell v. Fuhrman, Mass., 123 N. E. 237.

62. **Judgment**—Collateral Attack.—Any party interested or affected by a void judgment may attack it collaterally, in a proper case, or by a direct proceeding to have it stricken.—Reynolds v. Lloyd Cotton Mills, N. C., 99 S. E. 240.

63. **Landlord and Tenant**—Privy in Estate.—Purchaser of an undivided interest in leasehold

estate makes himself a privy in estate with original lessor, and, as there is no privity of contract between the two, purchaser is liable to lessor only as a privy in estate in respect to covenant running with the land only in proportion to his interest.—Bancroft v. Vizard, Ala., 81 So. 560.

64.——Public Use.—Where property is leased to a tenant for public use the care required by the landlord as to existing nuisances and their continuance by tenant is of a higher degree than when the property is let for private purposes, such being a matter of public policy.—Larson v. Calder's Park Co., Utah, 180 Pac. 599.

65. **Libel and Slander**—Importing Crime.—While a statement, to be defamatory of one in respect to public office, need not import a charge of crime, it must impute to him some incapacity or lack of due qualification or positive past misconduct which will injuriously affect him in office, or the holding of principles hostile to the maintenance of government.—Hendrix v. Mobile Register, Ala., 81 So. 558.

66. **Limitation of Actions**—Plea a Demurrer.—A note showing on its face that it is outlawed does not render a petition pleading it in full and praying for judgment demurrable, where plaintiff alleges that his failure to begin action within statutory period of five years was due to absconding and concealment of defendant.—Cummings v. Arthur J. Keating & Co., Neb., 172 N. W. 358.

67. **Master and Servant**—Contributory Negligence.—Where an employe's violation of the master's rules contributes to his injuries as a proximate cause thereof, it is contributory negligence, a defense which a master, who has not elected to operate under the Workmen's Compensation Act, cannot set up.—West Kentucky Coal Co. v. Simthers, Ky., 211 S. W. 580.

68.——Danger Incident to Work.—Where a builder's employe was injured by stepping into a well concealed beneath a door which he was helping to remove from a floor, his employer could not escape liability on the ground that the work itself created the danger.—Warner v. Spalding & Kearns, Iowa, 172 N. W. 263.

69. **Navigable Waters**—Drains.—Unless precluded by some act of its own or some right of a neighboring state or the federal government, a state may authorize a municipality to empty its drains into the sea, at least so long as a nuisance interfering with private constitutional rights is not created.—Darling v. City of Newport News, U. S. S. C., 39 S. Ct. 371.

70. **Negligence**—Comparative Negligence.—If plaintiff, a driver's guest, and defendant railroad, were both at fault when hand car frightened the driver's mule, plaintiff could still recover, but his damages should be diminished in proportion to amount of fault attributed to him, as provided by Civ. Code 1910, § 2781.—Central of Georgia Ry. Co. v. Reid, Ga., 99 S. E. 235.

71.——Proximate Cause.—No action will lie when the negligence of plaintiff and defendant proximately co-operate in producing the injury complained of.—La Mountain's Adm'x v. Rutland R. Co., Vt., 106 Atl. 517.

72. **Partnership**—Dissolution.—The court trying bill for dissolution of partnership, having made provision for sale of the firm's hotel lease under such conditions as will yield best results reasonably obtainable, and having adjudicated nonforfeiture of lease, is without power to require lessor to file a consent to sale or waiver of its rights under lease, and its decree of sale is not improvident for its failure to do so; assumption being that, if sale does not bring a fair price, court will decline to confirm it.—Clifford v. Gardner, Ala., 81 So. 544.

73. **Principal and Agent**—Accepting Benefit.—If one repudiates an unauthorized contract entered into by his agent, he must reject it as a whole, and cannot avail himself of favorable provisions and reject others.—State Bank of Bladen v. Strickler, Neb., 172 N. W. 361.

74.——Personal Advancement.—Agent cannot use the power conferred upon him by principal for his own personal advantage, the principal being entitled to all the benefits.—Conant v. Pettit, N. J., 106 Atl. 469.

75.——Use of Another Name.—One who uses another's name must know whether he has authority, and if he uses it without authority in contracting an indebtedness will be personally liable for indebtedness, regardless of his intention.—Duncan Electric & Ice Co. v. Dickey, Okla., 180 Pac. 703.

76. **Principal and Surety**—Indulgence.—An agreement by creditor not to take action against the principal, which is without consideration, is a mere indulgence and unenforceable and, as it does not prevent the creditor from pressing his claim, it cannot operate to discharge the surety.—State v. Northrup, Conn., 106 Atl. 504.

77. **Quieting Title**—Possession.—A bill to quiet and determine title is fatally defective, where it does not allege possession in complainant.—Street v. Watts, Ala., 81 So. 564.

78. **Railroads**—Unnecessary Noise.—A railroad company is liable for injuries caused by a team on a neighboring road becoming frightened, if such injury is occasioned by unusual and unnecessary noise made by the train.—Baker v. Galbreath, Tex., 211 S. W. 626.

79. **Replevin**—Possession.—Possession of furniture by defendant's tenant was sufficient to sustain judgment in claim and delivery against defendant, where he was resisting delivery of the property to plaintiff owner.—Eastern Outfitting Co. v. Myers, Cal., 180 Pac. 669.

80. **Sales**—Acceptance.—Where sales contract prepared by seller provided that contract should not take effect until seller's acceptance, evidenced by signature of seller's manager, such mode of acceptance was prescribed for seller's benefit and could be waived by seller and the contract accepted by any other mode.—Steinbrenner v. Minot Auto Co., Mont., 180 Pac. 729.

81.——Conditional Sale.—Where the contract for the conditional sale of a piano authorizes a taking of possession on default in payment, such taking does not work a rescission of the contract, requiring restoration by seller of the status quo by repaying to buyer all payments made by buyer.—Mohler v. Guest Piano Co., Iowa, 172 N. W. 302.

82. **Taxation**—Inheritance Tax.—A transfer by will of capital stock of domestic corporation is subject to state inheritance tax, although testator resided in another state and kept certificates of stock there, and courts of that state could acquire jurisdiction of corporation by service of process therein.—State v. Probate Court of St. Louis County, Minn., 172 N. W. 318.

83.——Situs.—Under Ky. St. § 4020, all iintangible personal property has a situs for the purpose of taxation at the domicile only of the owner, who can have but one domicile or home, although he may maintain his residence elsewhere.—Millett's Ex'r v. Commonwealth, Ky., 211 S. W. 562.

84.——Swamp Lands.—Swamp and overflow lands belonging to the state are not subject to taxation.—Penick v. Floyd Willis Cotton Co., Miss., 81 So. 540.

85. **Vendor and Purchaser**—Counter Offer.—Right of plaintiff to hold defendant to the terms of his offer to sell is lost by a reply amounting to a counter offer, with different terms as to time of payment; this constituting a rejection of defendant's offer, which cannot be revived by a subsequent tender of acceptance.—Beaumont v. Prieto, U. S. S. C., 39 S. Ct. 383.

86. **War**—Alien Enemy.—Despite the Hague Convention of 1907, c. 1, § 2, art. 23h, proceedings for proof of the will of a Massachusetts decedent need not be suspended because one of the heirs at law becomes an alien enemy pending the proceedings.—Riddell v. Fuhrman, Mass., 123 N. E. 237.

87. **Wills**—Delusion.—A "delusion" is a fixed belief in a proposition which has no foundation in evidence and which is so extravagant that a reasonable man would not adhere to it.—In re Sturtevant's Estate, Ore., 180 Pac. 595.

88. **Witnesses**—Manner of Testifying.—The manner in which witness testifies often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction.—Richey v. Butler, Cal., 180 Pac. 652.

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